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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MERCED,

Defendant and Appellant.

C058631

(Super. Ct. No. 07F07403)

Defendant Jose Merced appeals his convictions for assault with a deadly weapon and corporal injury to a spouse, claiming the trial court prejudicially erred in failing to give a sua sponte unanimity instruction. We affirm.

FACTUAL BACKGROUND

On July 18, 2007, Magelia Merced¹ and defendant were rebuilding their relationship after a period of separation. Magelia had given defendant a key to the house and he was in the process of moving back into the home. That evening Magelia and

¹ Because the victim has the same last name as defendant, for clarity we will refer to her by her first name.

her friend Brandy Bashay were shooting pool at a friend's house. While there, Magelia received voicemail messages from defendant, explaining he was at the house and asking where she was. His manner of speech suggested he was "drunk" and "upset."

Magelia and Bashay returned to Magelia's house around 11:30 p.m. Magelia planned to take her children to spend the night at Bashay's because she was afraid of a confrontation with defendant. Magelia went into the house while Bashay waited in the car. As Magelia went to the front door, defendant was crossing the street toward the house. Because defendant had been "talking mess" in the messages he had left for her and she believed he was drunk, when Magelia let herself in the house she locked the door behind her. Defendant tried to open the door, ordered Magelia to open it, and then threatened to break the window. Magelia refused to open the door and told defendant to use his key. He did not have his key with him, so he broke the window and reached inside to unlock the door. Magelia hit and slapped at his hand, told him to leave, and tried to call 911. Defendant took some of the broken glass from the window and stabbed Magelia in the head with it. Her head was bleeding from this injury.

Defendant unlocked the front door through the broken window and came in the house. When he came in the house, he "rushed" toward Magelia and threw a shard of glass from the broken window at her. The glass hit her in the leg, cutting through her jeans and causing a gash in her leg. Magelia tried to push defendant out of the house. The two began to wrestle and fell to the

ground. Defendant was hitting Magelia in the face and head. He got a crowbar and she was afraid he was going to hit her with it. They struggled over the crowbar and as they were struggling, Bashay came into the house. When Bashay came in, defendant was on top of Magelia, holding the crowbar raised over his head in his right hand, as if to hit Magelia with it. Bashay repeatedly yelled at them to stop fighting and took hold of the crowbar. She tried to get the crowbar away from defendant and yelled for Magelia to help. Magelia was able to get up from the floor and helped Bashay wrest the crowbar from defendant.

Magelia's son, R. J.,² had been watching television in the front room of the house. He saw defendant break the window and throw glass at Magelia. While defendant and Magelia were on the ground fighting, she tossed R. J. a cell phone and told him to go to his room and call 911. Magelia told the 911 operator defendant had thrown glass at her.

After Bashay got the crowbar from defendant, Magelia ran outside the house and defendant locked her out. While she was locked out of the house, defendant broke a fish tank and a side window. Bashay heard the children crying in the back bedroom and went to get them. Because there was glass all over the front room, she led them out of the house through a bedroom patio window. Eventually, defendant left the home.

² Because the minor child has a distinctive name, we shall refer to him as R. J.

When she was interviewed by police officers, Magelia appeared upset and angry with defendant. Officers noticed she had suffered injuries to her head and leg. There was dried blood on her neck and blood was still flowing from the injury on her leg.

R. J. told police officers he saw defendant break the window and throw glass at Magelia. He called 911 and returned to his room, as his mother had told him to do.

At trial, Magelia denied defendant threw glass at her. She testified he told her to back up while he hit the glass out of the window. She did not back up and the glass hit her on the leg, cutting her. As to the crowbar, she testified she "might have" grabbed the crowbar from under the couch in her living room. She denied defendant ever held the crowbar over her as if to hit her, although she acknowledged they were struggling over it until Bashay came in. Magelia claimed she sustained the cut on her head after she was locked out of the house and tried to climb back in through the front window.

Magelia testified she had claimed defendant was throwing glass at her during the 911 call to expedite the arrival of police to the house. She was angry at defendant for messing up her house and had wanted him to be arrested, so she exaggerated the severity of what happened. She also said she lied to police officers when she told them defendant had stabbed her or poked her in the head with glass. Magelia admitted she had previously falsely accused defendant of violence toward her.

At trial, R. J. also said he lied to the police. He testified he did not hear or see the windows being broken, the fight between defendant and Magelia, or defendant throwing glass. He was in his room through the whole fight. The only violence he saw was his mother beating up defendant. He lied to the police because he thought his mother was mad and he saw cuts on her head which made him feel angry and protective of her.

At trial, Bashay did not remember telling officers anything. She denied she had seen defendant break the fish tank or the window, she had just assumed he was responsible for breaking them. She also claimed she did not see defendant throw glass at Magelia, but that Magelia had told her he had done so. She lied to officers because she was angry at defendant for his involvement in helping her boyfriend move out of their home. She was also angry at him for ruining her and Magelia's fun night out. Finally, she wanted to support Magelia, so she repeated what Magelia had told her. Bashay also acknowledged she had been convicted for welfare fraud in 2003.

Magelia's sister, Tracie Richardson, testified on defendant's behalf. She spoke with Magelia early in the morning of July 19, 2007, and Magelia told her defendant had broken windows in the house. Magelia was angry and wanted defendant to go to jail. Accordingly, she told Richardson that she was going to tell police defendant had been violent with her. Specifically, she planned to tell the police defendant had stabbed her. She also explained she had actually injured her

head climbing through a window. Richardson also testified that Magelia had a reputation for lying and being vindictive.

Evidence was also presented regarding two prior incidents of domestic violence between defendant and Magelia. In September 1998 defendant and Magelia argued. Defendant pulled a gun on Magelia and told her to shut up. Later in the day, she and defendant went to a local convenience store. Defendant took her keys and she fought with him to get them back. He then tried to disable the engine. She pushed at him and told him to stop. He grabbed her by the shirt and repeatedly slammed her against the hood of the car. The store's security guard thought defendant was choking Magelia. He told defendant to stop. Defendant did not stop choking Magelia until the security guard sprayed mace in his face. Defendant pled no contest to making a criminal threat.

At trial, Magelia denied defendant had pulled a gun on her. She also denied that he had pushed her down on the hood of the car and choked her.

In December 2001, Magelia and defendant got into an argument regarding the paternity of one of her children. She advised defendant unequivocally that he was not the father of the child. Defendant got angry, grabbed her arm, threw her down, and sat on her chest. She could not breathe and ultimately her brother had to pull defendant off of her. Magelia went to the emergency room complaining of pain in her chest and neck and when taking a deep breath. Defendant pled no contest to simple battery on a spouse.

At trial, Magelia testified she could not remember if defendant had attacked her. She acknowledged she had gone to the hospital that night because of shoulder pain.

PROCEDURAL HISTORY

Defendant was charged with assault with a deadly weapon, "to wit a shard of glass and a crowbar," by means of force likely to produce great bodily injury and corporal injury to a spouse. It was further alleged defendant had sustained two prior serious felony convictions.

Following a jury trial, defendant was found guilty as charged. In bifurcated proceedings, the jury found the prior conviction allegations true. After denying defendant's motion to strike a prior strike conviction, the court sentenced defendant to a term of 25 years to life. Defendant was awarded 230 days of actual credit, 114 days of conduct credit under Penal Code section 4019 for a total of 344 days of credit. Various fines and fees were also imposed.

DISCUSSION

I

Unanimity Instruction

Defendant contends, based on the prosecutor's closing argument that there were multiple acts which could have constituted the assault with a deadly weapon, the trial court

had a sua sponte duty to give a unanimity instruction to the jury.³ We disagree.

During closing argument, the prosecutor argued the assault with a deadly weapon could have been committed "either with a shard of glass or a crowbar. If you find that any assault occurred with one of those weapons and you unanimously agree on that particular act, then he has committed that crime" Later, the prosecutor argued the only reasonable explanation of the evidence was that defendant assaulted Magelia "with a piece of glass and with a crowbar. And again, you don't have to find both. Just one of those if you agree on that act is enough"

A jury properly may convict the defendant of a charged offense only if it unanimously agrees he committed the same underlying act. (*People v. Jones* (1990) 51 Cal.3d 294, 321.) "It has long been held that a unanimity instruction must be given where the evidence shows that more than one criminal act was committed which could constitute the charged offense, and

³ Defendant argues there were two distinct acts upon which defendant could have been convicted of assault with a deadly weapon, either "with a shard of glass as he tried to gain entry or with a crowbar as the pair struggled inside the residence." There are two weapons which could have been used as deadly weapons to perpetuate the assault. However, we discern three distinct acts which could have formed the basis of the assault with a deadly weapon conviction, poking Magelia in the head with the shard of glass, throwing the shard of glass at her and cutting her leg, or brandishing the crowbar. Under the facts of this case, our analysis of this issue is the same whether there are two or three distinct acts.

the prosecution does not rely on any single act.” (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631.)

“[A] trial court is not obligated to give an instruction--either requested or sua sponte--if the evidence presented at trial is such as to preclude a reasonable jury from finding the instruction is applicable. [Citation.] ‘A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.’ [Citations.] In other words, ‘[i]f under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary.’ [Citations.]” (*People v. Muniz* (1989) 213 Cal.App.3d 1508, 1517-1518.)

“The unanimity instruction is not required when the acts alleged are so closely connected as to form part of one transaction. [Citations.] The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) The continuous course of conduct exception applies “where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim’s testimony in toto. . . .” (*People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791, fn. 5, disagreed with on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330; see also *People v. Leffel* (1988) 203 Cal.App.3d 575, 587.)

Here, there were multiple distinct acts by defendant that could have justified the assault with a deadly weapon charge: poking Magelia in the head with a shard of glass, throwing a shard of glass at her, or brandishing the crowbar at her. Nonetheless, there was no need to give a unanimity instruction in this case, as all of those acts constituted one continuous course of conduct. The acts were all committed at Magelia's home as defendant fought to get in and she struggled to keep him out. Defendant broke the window of the house, poked Magelia in the head with the glass as she hit him to keep him out, threw a shard of glass at her which hit her leg as he entered the house, then charged her, got the crowbar and raised it over his head as if to hit her with it. These acts were committed within a short period of time, in the same place and against a single victim. As such, they were "so closely connected as to form part of one continuing transaction" and no unanimity instruction was required. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275; see *People v. Turner* (1983) 145 Cal.App.3d 658, 681, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 411.)

In an effort to avoid a finding of a continuous course of conduct, defendant attempts to parse the defenses offered as to these multiple acts. He claims he acknowledged that glass flew when he broke the window, but that Magelia's injuries from the glass were accidental, not intentional. Whereas, he entirely denied any assault with the crowbar happened. We are not persuaded that the defenses offered were so distinct. In fact,

as to all the claims, defendant denied he intentionally assaulted Magelia. He denied throwing glass, poking her in the head with glass, and brandishing the crowbar.

Contrary to defendant's claim, there was no rational reason for the jury to find one of the acts took place and at the same time find the others did not. (See *People v. Leffel, supra*, 203 Cal.App.3d at p. 587.) Defendant did not admit some acts and deny others, he denied them all. The thrust of his defense was Magelia, Bashay, and R. J. all lied in their statements to officers the night of the assault. At trial, Magelia recanted all the claims regarding the assault. She specifically stated she had lied to officers at the time because she was mad at defendant and wanted him arrested. Similarly, at trial, Bashay recanted most of her statements to the officers, indicating she had not seen anything. She claimed she lied to officers at the time, both because she was angry with defendant and wanted to be supportive of Magelia. R. J. also testified he had lied to officers that night, in an effort to support his mother. According to their trial testimony, defendant did not assault Magelia with either a shard of glass or a crowbar. By contrast, Bashay's, Magelia's and R. J.'s statements to the police each indicated defendant assaulted Magelia with the glass and the crowbar. Essentially, the jurors were offered a choice of believing the statements made to officers by Bashay, Magelia and R. J. or believing their trial testimony. There was no basis for the jury to accept some parts of the statements to the

officers and reject others or to accept some portions of their trial testimony and reject others.

The jury's guilty verdicts indicated that it rejected defendant's attacks upon the credibility of the witnesses' statements to the officers. The record indicates the jury resolved the basic credibility issue against defendant. The jury must have believed, beyond a reasonable doubt, defendant committed all the acts if he committed any.

II

Conduct Credit

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he had prior convictions for a serious or violent felony. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

We concur: _____, J.
ROBIE

_____, P. J.
SCOTLAND

_____, J.
CANTIL-SAKAUYE